Supreme Court, U.S.
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In The

Supreme Court of the United States

N.L. NEILSON,

Petitioner,

vs.

CITY OF CALIFORNIA CITY,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeals
For The Fifth District

PETITION FOR WRIT OF CERTIORARI

N.L. Neilson
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805 485-3270

Petitioner pro per

QUESTION PRESENTED

Is the great disparities in one's allocable share of the total tax burden relative to their property holdings, 59,000 to 1, in the flat-rate parcel tax of this case a violation of the Equal Protection Clause of the 14th amendment of the United States Constitution?

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

None. A previous case primarily based on the voting issue was *Neilson v. City of California City* (2005), 133 Cal.App.4th 1296

JURISDICTION

The California Supreme Court denied review on October 1, 2008. (A14).

The California Court of Appeal for the Fifth District denied the petition for rehearing on July 21, 2008, (A14), on its Opinion filed on August 1, 2008, (A1). Petitioner seeks review of that judgment/Opinion on a writ of certiorari.

The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

The U.S. Equal Protection issues were properly raised in the Complaint and in further proceedings.

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 10(c) to review on a writ of certiorari the judgment of a state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Equal Protection Clause. California Constitution Articles XIII and XIIIA § 4.

STATEMENT OF THE CASE

On December 5, 2006, the City Council of the City of California City (City) passed Resolution No. 12-06-2242, which called a municipal election for March 6, 2007, and directed that voters be presented with a measure for a city-wide special tax of up to $100 per lot or parcel for each of the next five fiscal years beginning July 1, 2007. At the March 2007 special election, the proposed parcel tax was presented to the registered voters of the City as Measure A. The stated purpose of the parcel tax was 30 percent for police services, 25 percent for fire services, 30 percent for street services, and 15 percent for parks and recreational purposes. The measure passed with two-thirds of the votes.

The complaint alleged that California City has unconstitutionally imposed a property tax that is not taxed in proportion to its value, as is required by the Equal Protection Clause of the United States Constitution Amendment XIV Section 1 and the United States Supreme Court's ruling in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, (1989)(*Allegheny*).

The tax is triggered merely by the ownership of property.

Petitioner is the owner of property within California City and that property is subject to the parcel tax challenged in this action. California City is a city duly organized and located in Kern County, California.

The Kern County Assessor's annual report for California City stated that the city contained 51,940 parcels of real estate valued at $616,360,717. Consequently, the $100 per parcel tax will result in the imposition of over $5 million in taxes. If this tax burden had been imposed based on the assessed value of the parcels, then the tax collected on each $1,000 of assessed property value would have increased approximately $8.43.

Implementation of the flat-rate parcel tax would mean that a parcel worth $117 million and a parcel worth $36 million would be assessed the same $100 annual tax as a parcel worth $1,976. As a result, the ratio between tax and value for the parcel worth $1,976 would be over 59,000 times greater than the same ratio for the parcel worth $117 million.

On June 12, 2007, after a hearing the superior court took the matter under submission. It issued a written ruling on June 20, 2007, (A16) which stated, among other things, that there was no equal protection violation. Judgment was entered in favor of California City.

On June 12, 2008, the Court of Appeal for the Fifth Appellate District of California heard oral

argument and the case was submitted. On July 1, 2008, the Opinion was filed that the judgment was affirmed (A1). Petition for rehearing was denied by that Court on July 21, 2008 (A15).

The California Supreme Court denied the Petition for Review on Oct. 1, 2008 (A15).

ARGUMENT

A. U.S. Equal Protection Clause

In this case an instance is given were the tax burden relative to property holdings is 59,000 to one. The flat-rate parcel tax systematically and intentionally discriminates against property owners of lesser valued property in favor of owners with property holdings of much greater value.

The flat-rate parcel tax is in violation of the U.S. Equal Protection Clause.

The U.S. Supreme Court has held that disparate taxation is "intentional and systematic" – and thus in violation of the Fourteenth Amendment – when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 25 (1931). (*Cumberland*)

The discrimination resulting from the City's deliberately adopted policy, the flat-rate parcel tax on the mere ownership of real property, is of historic magnitude.

The U.S. Supreme Court has struck down discriminatory practices that taxed the complainants' property at twice the level of comparable property. *Cumberland Coal, supra; Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). Other courts, properly applying this Court's principles, have struck down state taxing schemes yielding even smaller

disparities. See, e.g., *Louisville & Nashville R.R. v. Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980) (complainant taxed at 158 percent level of comparables), cert. denied, 450 U.S. 959 (1981); *Weissinger* v. *Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971) (177 percent); *Savage* v. *State Tax Comm'n*, 722 S.W.2d 72, 79 (Mo. 1986) (en banc) (160 percent disparity "so grossly excessive as to be entirely inconsistent with an honest exercise of judgment");

The flat-rate parcel tax that is $100 for each parcel regardless of any value or value standard is in conflict with U.S. Case Law.

> But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 346 (1989), (*Allegheny*).

In *Nordlinger* v. *Hahn* (1992) 505 U.S. 1, 4

> In this litigation, we consider a challenge under the Equal Protection Clause of the Fourteenth Amendment to the manner in which real property now is assessed under the California Constitution.

The City's tax is distinguished from Nordlinger since it is not a challenge to the way property is

assessed. The flat-rate parcel tax is $100 for every parcel regardless of the assessed value. A parcel assessed at $117 million has a tax burden of $100. A parcel assessed at $1,976 (.001976 million) has a tax burden of $100. Using these figures the tax burden relative to property holdings is about 59,000 to 1. The flat-rate parcel tax conflicts with *Allegheny, supra* 488 U.S. 336, 346 " ... tax burden ... relative to their property holdings."

The flat-rate parcel tax is the City's deliberately adopted system by Resolution No. 12-06-2242 and conflicts with *Cumberland, supra*
284 U.S. 23, 25

> " ... disparate taxation is ... in violation of the Fourteenth Amendment – when clearly disparate assessments are "made pursuant to a deliberately adopted system," ... ".

The Court of Appeal's Opinion (A7) has *Nordlinger, supra* 505 U.S. at p. 11.

> "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation], the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, [citation], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, [citation]. This standard is

> especially deferential in the context of classifications made by complex tax laws. '[I]n structuring internal taxation schemes "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" [Citations.]'" [Citations.]"
> That Court failed to address the first sentence.
>
> "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification ... "

The City has made no "classification" so there can be no "plausible policy reason" for a classification that does not exist. There has to be a classification that is reasonable to justify the disparate taxation.

B. California State Law

The issue in this case at the Trial Court, the Court of Appeal and this Court is whether the tax is unconstitutional under the U.S. Equal Protection Clause. The State Laws must be considered.

1. Article XIII §1

Article XIII §1 of the California Constitution provides that all property is taxable and shall be assessed at the same percentage" of fair market value or an authorized "value standard other than fair market value." The clear import of this language, as well as the history of property taxation in this state, leads to the conclusion that a property tax must be ad

valorem. Since its admission into the union, California has required uniformity of property taxation.

ARTICLE 13 TAXATION SEC. 1. Unless otherwise provided by this Constitution or the laws of the United States:

> (a) All property is taxable and shall be assessed at the same percentage of fair market value. When a value standard other than fair market value is prescribed by this Constitution or by statute authorized by this Constitution, the same percentage shall be applied to determine the assessed value. The value to which the percentage is applied, whether it be the fair market value or not, shall be known for property tax purposes as the full value.
>
> (b) All property so assessed shall be taxed in proportion to its full value.

2. *Thomas and Digre*

In the case of *Thomas v. City of East Palo Alto*, (1997) 53 Cal.App.4th 1084, 1086

> In this appeal, we conclude the trial court correctly ruled that the City of East Palo Alto (the City) had unconstitutionally imposed and collected a property tax not apportioned according to value, as is required by article XIII, section 1 of the California Constitution (section 1).

In *Thomas* the tax was called an "excise" tax, Cal City has called theirs a "special" tax, it is a real

property tax on the mere ownership of property the same as in *Thomas*.

The flat-rate parcel tax is a property tax whose imposition is triggered merely by the ownership of property. (*City of Huntington Beach v. Superior Court* (1978) 78 Cal. App. 3d 333, 340 ["Real property taxes are imposed on the ownership of property as such . . . ."].)

In *Thomas, supra,* 53 Cal.App.4th 1084, 1092

> We can conceive of flat fee parcel taxes which might arguably pass constitutional muster under section 1. For instance, a flat fee of $ 100 per parcel for the transfer or rezoning of a parcel, assessed at the time of the transfer or application for rezoning, would not violate section 1, because it would be a valid excise tax based upon the use of the parcel; and its practical effect would not be to tax the ownership of the parcel, but instead to tax its use.

The City's flat-rate parcel tax is the same as in *Thomas* where the practical effect is to tax the ownership of the parcels and not taxing the use of the property.

The City's flat-rate parcel tax is also similar to that in the case of *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99 where the flat-fee "parcel tax" designed to raise revenue for the support of municipal services was a non-ad valorem general property tax prohibited by Art XIII § 1.

Digre, supra, 205 Cal.App.3d 99, 109

> As a property tax, Measure M violates article XIII, section 1 of the California Constitution. That section provides that "[all] property is taxable and shall be assessed at the same percentage" of fair market value or an authorized "value standard other than fair market value." The clear import of this language, as well as the history of property taxation in this state, leads to the conclusion that a property tax must be ad valorem. "Since its admission into the union, California has required uniformity of property taxation . . . . [It] is apparent that the mandated uniformity of taxation can be achieved only by applying to all property the same fraction or percentage of market value." (Safeway Stores, Inc. v. County of Alameda (1975) 51 Cal.App.3d 783, 786 [124 Cal.Rptr. 503]; see generally, English v. County of Alameda (1977) 70 Cal.App.3d 226, 234 [138 Cal.Rptr. 634]; 1 Ehrman & Flavin, op. cit. supra, § § 1:02-1:15, pp. 4-25.) A non-ad valorem property tax would destroy the uniformity scheme, and must be considered in violation of California Constitution, article XIII, section 1. Both the Attorney General and the legislative counsel have reached a similar conclusion. (70 Ops.Cal.Atty.Gen. 153, 156-157 (1987); Ops. Cal. Legis. Counsel, No. 8471 (1987) School District: Taxation.)
>
> "[it] is apparent that the

> mandated uniformity of taxation can be achieved only by applying to all property the same fraction or percentage of market value."

It should be apparent to the City also.

In *Digre* the tax was levied on the mere ownership of real property, and not on any separate incident to property ownership. The City's flat-rate parcel tax is on the mere ownership of real property, the same as in *Digre*.

Thomas and *Digre* did not determine whether a "special" tax passed by two-thirds vote, based upon mere ownership of real property, was unconstitutional if not apportioned according to value as is required by Art. XIII § 1. A case that touches on this and relied on by the City as case law to justify the tax is *Heckendorn v. City of San Marino* (1986) 42 Cal.3rd 481, 488 (*Heckendorn*)

> We regard this legislative construction of special tax to have "very persuasive significance" in our analysis of article XIII A. (*Delaney* v. *Lowery* (1944) 25 Cal.2d 561, 569 [154 P.2d 674].) In addition, we interpret "parcel" in this statute broadly to allow a graduated tax based on the size of a parcel as in the City's ordinance. To construe the term parcel otherwise would lead to the unjust result that any special tax imposed on a parcel basis under this statute would have to be equal for a lot of 9,000 square feet and an estate the size of

> Huntington Library. (Cf. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259-260 [104 Cal.Rptr. 761, 502 P.2d 1049] [statutory language should be construed to best attain the statute's purpose in order to avoid absurdity or to prevent injustice].)

Heckendorn only decided that a parcel tax based on lot size rather than value was not an ad valorem tax.

> *Digre, supra* 205 Cal.App.3d 99, 110
>
> Oakland, however, again relies on Heckendorn and claims that non-ad valorem property taxes are permitted, and have always been permitted, by article XIII, section 1. Heckendorn, however, is not direct authority for Oakland's contention because of the limited nature of its holding. The opinion never mentions article XIII, section 1 or the validity of a general non-ad valorem property tax. Cases are not authority for propositions they do not consider. (In re Tartar (1959) 52 Cal.2d 250, 258 [339 P.2d 553].)

The City's flat-rate parcel tax is on the mere ownership of property, the tax burden is not apportioned according to value or a "value standard" and is in violation of this States Article XIII §1(b)pursuant to Article XIII §1(a).

C. California Article XIII A §4

From Proposition 13
CALIFORNIA CONSTITUTION
ARTICLE 13A (TAX LIMITATION)

> Section 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

The City is interpreting "except ad valorem taxes on real property" to mean ANY tax on real property that receives a two thirds vote that is not ad valorem is a legal tax. This is in violation of the U.S. Equal Protection Clause, *Cumberland, Allegheny, Nordlinger* and California's Article XIII §1.

From a previous case between the same parties as this case that was primarily on the voting issue *Neilson v. City of California City* (2005)133 Cal.App.4th 1296, 1305-1306

> The principle that clear language does not need construction, however, is subject to the exception that the literal language of a constitutional amendment may be disregarded to avoid absurd results and to give effect to the apparent intent of the voters. (Provigo Corp. v. Alcoholic Beverage Control Appeals Bd. (1994) 7 Cal.4th 561,

567; Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.)

It is clear that the intent of the voters this was to be a "TAX LIMITATION" and not a loop hole for taxing agencies. That Court also relied on a utility users tax case which has little if any bearing on a tax on the mere ownership of property. *Neilson, supra,* 133 Cal.App.4th 1296, 1309-1310

> The *Roseville* court then determined that a utility user's tax, which generated revenues solely for police, fire, parks and recreation, and library services, was a "special tax" because it was imposed for specific purposes. (Howard Jarvis Taxpayers Assn. v. City of Roseville, supra, 106 Cal.App.4th at pp. 1183, 1186.)

D. Article III §3

Neither the separation of powers nor property owner consent justifies allowing a local legislative body or property owners (both bound by the State and U.S. Constitutions) to usurp the judicial function of interpreting and applying the constitutional provisions that now govern assessments. Voter consent cannot convert an unconstitutional legislative assessment into a constitutional one.

If a taxing agency violates a constitutional right it is up to the Courts to invalidate the tax. The constitutional separation of powers provision has the purpose of preventing another branch of government

from violating the Constitution.

Their sources of revenue derived from real property, however, are restricted. Public entities may not resolve their revenue shortfalls through the subterfuge of enacting taxes on real property which violate those constitutional restrictions by labeling such taxes something they are not. We are required to uphold such constitutional provisions and invalidate such efforts to evade them, regardless of the merit of the goals for which such tax revenue is sought.

Thomas, supra, 53 Cal.App.4th 1084, 1091

The City as a legislative body does not have a right to impose a tax that is in violation of the State Constitution and surely not the U.S. Constitution. "There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right." (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.) " '[A]ll such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' " (Ibid.) Thus, a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect.

The Courts "must . . . enforce the provisions of our Constitution and 'may not lightly disregard or blink at . . . a clear constitutional mandate." (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 523.)

The Courts are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355.)

A recent California Supreme Court case on assessments has portions that are applicable to this case. *Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Authority* (2008, July 1) S136468

> p. 18 "However, voter consent cannot convert an unconstitutional legislative assessment into a constitutional one."
>
> Pg 19 "Neither the separation of powers nor property owner consent justifies allowing a local legislative body or property owners (both bound by the state Constitution) to usurp the judicial function of interpreting and applying the constitutional provisions that now govern assessments."
>
> p. 16 "These substantive requirements are contained in constitutional provisions of dignity at least equal to the constitutional separation of powers provision.
>
> (Cal. Const., art. III, § 3.)"

These is applicable to special taxes also.

The U.S. Equal Protection Clause should have as much "dignity" as a State Court's interpretation of the meaning of "except ad valorem taxes on real property" (Art XIII A § 4) to mean a tax on the mere

ownership of real property does not have to be a percentage of the value or value standard of the taxed property as long a they get a two thirds vote.

E. This Case Involves Questions of Exceptional Importance

U.S. Constitution Amen. XIV, Equal Protection Clause

"No State shall...deny to any person within its jurisdiction the equal protection of the laws."

> "But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." *Allegheny, supra* 488 U.S. 336, 346

There is a 59,000 to 1 ratio of tax relative to property holdings in this case that is intentional and systematic

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

December 22, 2008

N.L. Neilson

Petitioner pro per

Filed 7/1/08

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

N. L. NEILSON,

Plaintiff and Appellant, F053320

v. (Super. Ct. No. CV260509)

CITY OF CALIFORNIA CITY,

Defendant and Respondent.

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lee Phillip Felice, Judge.

N. L. Neilson, in pro. per., for Plaintiff and Appellant.

Lemieux & O'Neill and W. Keith Lemieux for Defendant and Respondent.

-ooOoo-

Plaintiff N. L. Neilson, a self-representing litigant, challenged defendant City of California City's (California City) flat-rate parcel tax on the grounds the tax violated the equal protection clause of the United States Constitution. The superior court sustained a demurrer to plaintiff's complaint without leave to amend.

We conclude that the equal protection clause, as discussed by the United States Supreme Court in *Allegheny Pittsburgh Coal v. Webster County* (1989) 488 U.S. 336 (*Allegheny*) and elsewhere, does not require a parcel tax to be in proportion to the value of the parcel.

Consequently, plaintiff failed to state a cause of action and the superior court correctly sustained the demurrer.

The judgment will be affirmed.

FACTS AND PROCEEDINGS(fn1)

The facts recited in this opinion are taken from plaintiff's complaint. As this action comes to us on demurrer, we assume the truth of the factual allegations contained in that pleading. *(Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Plaintiff is the owner of property within California City and that property is subject to the parcel tax challenged in this action. California City is located in Kern County and is a city duly organized and operating under the laws of California.

The Kern County Assessor's annual report for California City stated that the city contained 51,940 parcels of real estate valued at $616,360,717. Consequently, the $100 per parcel tax will result in the imposition of over $5 million in taxes. If this tax burden had been imposed based on the assessed value of the parcels, then the tax collected on each $1,000 of assessed property value would have increased approximately $8.43.(**fn2**)

Implementation of the flat-rate parcel tax would mean that a parcel worth $117 million and a parcel worth $36 million would be assessed the same $100 annual tax as a parcel worth $1,976. As a result, the ratio between tax and value for the parcel worth $1,976 would be over 59,000 times greater than same ratio for

the parcel worth $117 million.

On December 5, 2006, the City Council of California City passed Resolution No. 12-06-2242, which called a municipal election for March 6, 2007, and directed voters be presented with a measure for a city-wide special tax of up to $100 per lot or parcel for five fiscal years beginning July 1, 2007.

At the March 2007 election, the proposed parcel tax was presented to the voters of California City as Measure A. The stated purpose of the parcel tax was 30 percent for police services, 25 percent for fire services, 30 percent for street services, and 15 percent for parks and recreational purposes.

The registered voters in California City numbered 4,162, and 1,803 voted. Measure A passed by a vote of 1,225 (67.94 percent) to 578 (32.06 percent), which exceeded the two-thirds majority requirement.

Less than a month after the election, plaintiff filed a complaint for declaratory and injunctive relief to invalidate the $100 flat-rate parcel tax. The complaint alleged (1) the tax was a "general tax" and not a "special tax" for purposes article XIII C of the California Constitution, (2) the tax supplemented the general fund, and (3) the tax violated the equal protection clause. Paragraph 15 of the complaint alleged that California City "has unconstitutionally imposed a property tax that is not taxed in proportion to its value, as is required by the Equal Protection Clause of the United States Constitution Amendment XIV Section 1 and the United

States Supreme Court's ruling in *Allegheny, supra*. The tax is triggered merely by the ownership of property."

In May 2007, California City filed a demurrer that contended plaintiff's complaint failed to state sufficient facts to support a cause of action.

After a hearing on June 12, 2007, the superior court took the matter under submission. It issued a written ruling on June 20, 2007, which stated, among other things, that there was no equal protection violation.

Judgment was entered in favor of California City. Plaintiff filed a timely notice of appeal.

DISCUSSION

I. Standard of Review for General Demurrers

Appellate courts review an order sustaining a general demurrer without leave to amend using the following standard:

> 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the

> plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" *(Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

Whether a complaint has stated a cause of action is a question of law. *(Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1231.) We exercise our independent judgment when deciding this question of law-that is, we give no deference to the determination of the superior court. *(Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 495.)

II. Issue on Appeal

The question here is whether plaintiff stated a cause of action for a violation of the equal protection clause.

III. Equal Protection and Property Taxes

A. General Principles of Equal Protection

"No State shall ... deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend. XIV, § 1.) Similarly, article I, section 7, subdivision (a) of the California Constitution states in part: "A person may not be ... denied equal protection of the laws ...." The United States Supreme Court has described the equal protection clause as "essentially a direction that all persons similarly situated should be treated alike." *(Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

The California Supreme Court has addressed what must be established to prove an equal protection claim.

> "'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

When a showing has been made that two similarly situated groups are treated disparately, the next element of a meritorious equal protection claim concerns whether the government had a sufficient reason for distinguishing between the two groups. (*In re Brian J.* (2007) 150 Cal.App.4th 97, 125.)

Whether the government had a sufficient reason to subject the groups to different treatment is tested under one of three different standards. First, if the distinctions created by the statute, regulation or ordinance involve a suspect classification or affect a fundamental interest, the distinctions are subject to strict scrutiny and are upheld only if they are necessary to achieve a compelling state interest. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) Second, distinctions based on gender are subject to an intermediate level of review. (Ibid.) Third and most

commonly, the challenged distinctions must bear a rational relationship to a legitimate state purpose. (Ibid.)

Under the rational basis test, a court will not overturn a law, regulation or ordinance "'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [people's] actions were irrational.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 471 [mandatory retirement age for state judges reviewed and upheld under rational basis test].)

B. Principles Applicable to Taxes

Three and a half years after the United States Supreme Court decided Allegheny, it addressed whether article XIII A of the California Constitution violated the equal protection clause. (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10-17.) In that opinion, the court set forth some of the basic principles that apply when a tax is challenged on equal protection grounds.

> "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, [citation], the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, [citation], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, [citation]. This

> standard is especially deferential in the context of classifications made by complex tax laws. '[I]n structuring internal taxation schemes "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" [Citations.]" *(Nordlinger v. Hahn, supra,* 505 U.S. at p. 11.)

C. Level of Scrutiny Applied in this Case

Based on the foregoing principles and plaintiff's lack of an argument to the contrary, we conclude that the appropriate level of scrutiny for the flat-rate parcel tax is the rational basis test.

IV. Analysis

A. Plaintiff's Contentions

An essential part of plaintiff's argument that the flat-rate parcel tax is unconstitutional is the contention that the equal protection clause requires a property tax to be imposed in proportion to the property's value.

If this contention is not true-that is, if the equal protection clause permits property taxes to be imposed based on something other than value-then plaintiff's equal protection claim must fail.

B. Case Law

Plaintiff has relied on Allegheny for the idea that the burden of property taxes must be in proportion to value. In particular, plaintiff has quoted the following sentence from that decision: "But the fairness of one's allocable share of the total property tax burden can

only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." (*Allegheny, supra*, 488 U.S. at p. 346.)

The statement regarding the fairness of a property owner's allocable share of the tax burden must be placed in context to be understood.

Allegheny involved a challenge to the way West Virginia's property tax laws were being applied by a county assessor. (*Allegheny, supra*, 488 U.S. at p. 339.) The West Virginia Constitution guaranteed its citizens that, with certain exceptions, taxation would be equal and uniform throughout the state and all real property would be taxed in proportion to its value. (Id. at p. 338.) The tax assessor for Webster County based the appraised value of property on the declared consideration at which the property last sold with some adjustments for properties that had not been sold recently. (Ibid.) The adjustments, however, were small compared to the actual increase in property values. "This approach systematically produced dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land. For the years 1976 through 1982, *Allegheny* was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties." (Id. at p. 341.) The court concluded that the relative undervaluation of comparable property resulting from the unequal assessment practice denied the petitioners the equal protection of the law. (Id. at p.

346.)

The case of *Nordlinger v. Hahn, supra*, 505 U.S. 1 helps explain the application of the decision in Allegheny. In Nordlinger, the petitioners challenged the acquisition-value assessment method contained in California Constitution article XIII A on equal protection grounds. The United States Supreme Court observed that article XIII A, like the assessment practice in Allegheny, "resulted in dramatic disparities in taxation of properties of comparable value." (*Nordlinger v. Hahn, supra*, at p. 14.) Nevertheless, the court concluded that there were rational or reasonable considerations that supported the system that resulted in these dramatic disparities. (Id. at pp. 12-13.) As a result, it ruled article XIII A did not violate the equal protection clause. (Id. at pp. 16-18.)

Addressing its previous opinion in *Allegheny*, the court noted "an obvious and critical factual difference[:] ... the absence of any indication in *Allegheny* ... that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme." (*Nordlinger v. Hahn, supra*, 505 U.S. at pp. 14-15.) In Allegheny, in fact, the West Virginia Constitution and statutes "provide[d] that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." (*Allegheny, supra*, 488 U.S. at p. 345.) Thus, the underlying law provided that

the petitioners were entitled to have their property taxed in proportion to its value. The county assessor violated the equal protection clause by failing to apply that law equally to all property holders.

C. Circumstances of This Case

In this case, plaintiff is not contending that Measure A is being unequally applied. Measure A provides that each parcel is to be taxed a flat rate of $100 annually. Plaintiff's allegations demonstrate that landowners are being required to pay $100 per parcel owned. As a result, the tax measure is being applied equally. Instead, plaintiff is claiming the law itself, when applied as written, has denied him equal protection. The opinion upon which plaintiff relies, however, as described above, simply does not support plaintiff's position.

To prevail on his claim that Measure A itself violates the equal protection clause, plaintiff must show that some law requires a parcel tax, such as one authorized by section 4 of article XIII A of the California Constitution, to be assessed in proportion to the value of the property. There is no such law. Indeed, to comply with section 4 of article XIII A of the California Constitution, a special tax may not be an ad valorem tax.(**fn3**)

Furthermore, we will not read a substantive requirement into the equal protection clause by interpreting it to mean that all property taxes must be assessed in proportion to value. (See generally Cohen,

State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission (1990) 38 UCLA L.Rev. 87.) Such an interpretation is not consistent with the clause itself or the United States Supreme Court's application of the clause in *Allegheny* and *Nordlinger v. Hahn*.

In conclusion, plaintiff has based his equal protection claim on a legal theory that has not been recognized. Contrary to his contention, the equal protection clause does not require property taxes to be imposed based only on value. Consequently, plaintiff has failed to state an equal protection claim under a cognizable legal theory. The superior court correctly sustained the demurrer to plaintiff's complaint.

DISPOSITION

The judgment is affirmed. California City shall recover its costs on appeal.

DAWSON, J.

WE CONCUR:
Vartabedian, Acting P.J.
Levy, J.

Footnotes

1. As background, we note that plaintiff's lawsuit is his second attempt to invalidate California City's use of a flat-rate parcel tax. His first attempt was unsuccessful. (See Neilson v. City of California City (2005) 133 Cal.App.4th 1296 [order sustaining demurrer to complaint affirmed on appeal].) The equal protection argument that plaintiff raises in this appeal is different from the equal protection argument raised in the first

lawsuit. In the first lawsuit, plaintiff contended that the imposition of the flat-rate parcel tax violated the equal protection rights of nonresident landowners because they were not allowed to vote on the measure. (Id. at p. 1314.) We applied the rational basis test and held that the equal protection clause did not require California City to give nonresident landowners the right to vote on the measure that proposed the tax. (Id. at p. 1301.)

2. That is, 51,940 parcels times $100 per parcel equals $5,194,000 in taxes; $5,194,000 in taxes divided by $616,360,717 in assessed property value equals 0.008427, or 0.8427 percent. This figure can be restated as $8.43 in taxes per $1,000 of assessed property value.

3. In Neilson v. City of California City, supra, 133 Cal.App.4th 1296, "we conclude[d] that a non-ad valorem tax may be imposed upon real property if the tax is a 'special' tax dedicated to specific purposes and approved 'by a two-thirds vote of the qualified electors of' the city, county, or special district imposing the tax. (Art. XIII A, § 4.)" (Id. at p. 1308.) We will not revisit that conclusion here..

Filed July 21, 2008

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

N. L. NEILSON,

Plaintiff and Appellant, F053320

v. (Kern Super. Ct. No. CV260509)

CITY OF CALIFORNIA CITY,

Defendant and Respondent.

The petition for rehearing filed by appellant in the above entitled action is denied.

DAWSON, J.

WE CONCUR

VARTABEDIAN, Acting P.J.

LEVY, J.

Court of Appeal, Fifth Appellate District - No. F053320

S165756

IN THE SUPREME COURT OF CALIFORNIA

En Banc

N. L. NEILSON, Appellant,

v.

CITY OF CALIFORNIA CITY, Defendant and Respondent.

The petition for review is denied.

Kennard., J., was absent and did not participate.

FILED

FEB 22 2006

GEORGE

Chief Justice

Filed July 9, 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

N. L. NEILSON,

Plaintiff,, CASE NO.: S-1500-CV-**260509**

v. **Judge L.P. FELICE**

CALIFORNIA CITY, a city

Defendant. (...)JUDGMENT

TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND ALL PARTIES AND THEIR ATTORNEY OF RECORD:

The Decision/Minute Order: The Demurrer is sustained without leave to amend, was entered on June 20, 2007.

WHEREFORE, The Demurrer having been sustained without leave to amend the complaint is dismissed with prejudice, Judgment is awarded in favor of California City and against Plaintiff.

Dated: 7-9-07 Lee P. Felice

Judge of the Superior Court

Filed 6/20/2007

THE COURT'S RULING WITH REGARDS TO THE MATTER SUBMITTED ON 6/12/2007 IS ATTACHED HERETO AND MADE A PART HEREOF.

The plaintiff filed a complaint seeking injunctive and declaratory relief seeking to halt the imposition of a $100.00 parcel special assessment levied by California City and approved by 2/3 of the voters on March 6, 2007.

The plaintiff admits that 213 of the voters passed the measure. Nevertheless. he contends that the assessment violates the equal protection clause of the 14th amendment of the U.S. Constitution in that the city should assess a tax proportionate to its value. Second, the plaintiff contends that the tax is not a special tax but a general tax in that it taxes general government functions.

Third, the plaintiff contends that since he is not a resident of California City. he was not permitted to vote on the tax, and so the city abridged his right of franchise.

California City demurrer to the complaint contending that Mr. Neilson states no facts to constitute a cause of action because:

1. Assessment is a special tax earmarked for specific purposes;
2. The assessment is not an ad valorem tax but a flat tax assessed to every parcel no matter it value;
3. The election was held in accordance with the California constitution and the State Election code and government code;
4. Plaintiff is not eligible to vote since he does not reside in California City. The tax is a specific tax of interest to all residents of California City. The tax assessment as a rational basis since the maintenance of city services specially earmarked through this special assessment raises the quality of and property values. Every parcel holder is assessed the same $75.00;

5. The plaintiff raises the same issues as in his previous complaint which he lost on appeal when the Fifth Appellate District Court upheld the sustaining of a demurrer without leave to amend. *Neilson v. California City* (2005), 133 Cal. App. 4th 1296. The California Supreme Court denied review on this case.
The differences between the 2004 complaint, and the present complaint is in this complaint plaintiff raises an equal protection argument. He relies on *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County* (1989). 488 U.S. 336, 338 to support his argument. However, plaintiff's reliance on this case is misplaced for two reasons; 1. This case presupposes that the assessment California City imposed is an ad valorem tax. It is not. The tax assessed to every parcel no matter its value. 2. The U.S. Supreme Court acknowledged that so long as there is a rational basis to impose a tax, there is no equal protection violation. Id. At 344. The California State Constitution and proposition s 13.62, and 218 have schemes to impose special assessments provided that 2/3 of the voters approve them. Further, the City's scheme earmarked the funds for the purposes such as streets. parks. and fie and police services. In Allegheny. the county had no provisions for special assessments.

The special assessment complies with Cal. Const. Art. XII (a) (4) and Government Code Section § 53722 and 53723. Plaintiff's arguments were resoundingly rejected in *Neilson v. California City* (2005). 133 Cal. App. 4th 1296. That case delved into the history of

propositions 13, 62, and 218, and found that the imposition of the $75.00 parcel assessment is a special assessment for enumerated services passed by the electorate. The funds cannot be used for any other purposes. Contrast this to a general assessment which goes into the municipal coffers and where the city has discretion over the allocation of funds.

Plaintiffs arguments do no change here.

Finally, the City, in its demurrer cites the rational basis for the assessment scheme. and that it complied with California Election code and Government code in conducting the election and implementing the assessment. Plaintiffs arguments of disenfranchisement is without merit because Neilson cites U.S. Supreme Court authority upholding the assessment of taxes for nonresident property owners. Since plaintiff is not a resident. the strict scrutiny test afforded cases involving disenfranchisement does not apply. *Neilson v. California City supra* (2005), 133 Cal. App.4th 1296, 1315. Therefore. all California City need show is a rational basis for the special assessment enumerated in the summation of its contentions above.

California City's arguments have merit. and is in harmony with appellate courts holding *Neilson v. California City supra*.

The Demurrer is sustained without leave to amend due to the identity of issues already decided in 2005, and no new issues withstand scrutiny.

(L.P. Felice, Judge)